Filed 12/29/16 P. v. Mendoza CA5



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>BENJAMIN MENDOZA,<br><br>Defendant and Appellant. | F070324<br><br>(Super. Ct. Nos. BF149024A, BF153404A)<br><br>**OPINION** |

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Kern County. Steven M. Katz, Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Louis M. Vasquez, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Peña, J. and Smith, J.

Appellant Benjamin Mendoza pled no contest in case No. BF149024A to possession of methamphetamine for sale (Health & Saf. Code, § 11378).[1] In case No. BF153404A, he pled no contest to maintaining a place for selling, giving away or using methamphetamine (§ 11366).

On September 15, 2015, Mendoza's appellate counsel filed a brief which asked this court to independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Mendoza did not respond to this court's invitation to submit additional briefing.

However, on August 8, 2016, the Court of Appeal, First Appellate District, Division One filed its opinion in *People v. Watts* (2016) 2 Cal.App.5th 223 (*Watts*), which held that the $50 assessment imposed pursuant to section 11372.5 is a fee, not a fine, penalty or forfeiture, and thus not subject to penalty assessments. (*Id*. at pp. 229, 237.)

On September 6, 2016, appellate counsel filed a request for leave to file a supplemental opening brief seeking to challenge $145 in penalty assessments imposed on the $50 laboratory fee the court ordered Mendoza to pay in case No. BF149024A.

On October 26, 2016, this court granted Mendoza's request and allowed the parties to file a supplemental brief. In his supplemental brief, Mendoza relies on *Watts* to contend the $145 in penalty assessments imposed on the $50 laboratory assessment in case No. BF149024A must be stricken because the laboratory fee is not a penalty. We affirm.

## FACTS

On June 12, 2013, Kern County sheriff's deputies conducted a probation search of Mendoza's room at the Garden Suites Hotel while Mendoza and codefendant, Annabelle

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[1] Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

Miller, were present. During the search, the deputies found three baggies that contained a total of 142.6 grams of methamphetamine, six cellphones, a digital scale with suspected methamphetamine residue, hypodermic needles and syringes, some of which were loaded with suspected methamphetamine, and $449 in currency (case No. BF149024A).

On December 16, 2013, the district attorney filed an information in case No. BF149024A charging Mendoza and Miller with possession for sale of methamphetamine (count 1), possession of a controlled substance (count 2/§ 11377, subd. (a)), and possession of drug paraphernalia (count 3/§ 11364.1), a misdemeanor. The information also charged Mendoza with a prior conviction enhancement (§ 11370.2, subd. (c)).

On February 7, 2014, Mendoza entered his no contest plea in case No. BF149024A to possession for sale of methamphetamine in exchange for the dismissal of the remaining counts and allegations against him and for a stipulated, local term of three years, split into one year in local custody and two years on supervised release.

On February 20, 2014, based on an incident that occurred the previous day, the district attorney filed a six-count complaint against Mendoza and three codefendants (case No. BF153404A). The complaint charged Mendoza with maintaining a place for the purpose of selling, giving away or using methamphetamine (count 1/§ 11366), possession of methamphetamine (count 2/§ 11377, subd. (a)), possession of ammunition by a felon (count 3/Pen. Code, § 30305, subd, (a)(1)), and possession of narcotics paraphernalia (count 6/§ 11364.1).

On March 19, 2014, Mendoza failed to appear for his sentencing hearing in case No. BF149024A and the court issued a warrant for his arrest.

On July 28, 2014, in case No. BF153404A, Mendoza pled no contest to count 1 in exchange for the dismissal of the remaining charges against him, the prosecutor's

agreement not to charge Mendoza with felony failure to appear, and a stipulated, combined prison term of three years eight months in both cases.

On September 18, 2014, the court sentenced Mendoza pursuant to his plea bargain to an aggregate term of three years eight months, the aggravated term of three years on his possession for sale of methamphetamine conviction in case No. BF149024A and a consecutive eight months (one third the middle term of two years) on his conviction in case No. BF153404A for violating section 11366. In case no. BF149024A, the court imposed, without objection, a $50 laboratory fee pursuant to section 11372.5, subdivision (a) and $145 in penalty assessments. The court also imposed a $50 lab fee and $145 in penalty assessments on Mendoza's conviction in case No. BF153404A. However, the court "deleted" this fee and the penalty assessments when it was advised by the probation officer that section 11372.5 did not apply to a violation of section 11366. (See § 11372.5, subd. (a).)[2]

## DISCUSSION

Mendoza relies on *People v. Watts*, *supra*, 2 Cal.App.5th 223, to contend that the laboratory fee provided for by section 11372.5 is not subject to penalty assessments because it is a fee and not a fine. Thus, according to Mendoza, the $145 in penalty assessments must be stricken because they constitute an unauthorized sentence. We disagree.

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on

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[2] On October 2, 2014, the trial court issued an amended minute order for Mendoza's September 18, 2014, sentencing hearing in case No. BF153404A that erroneously indicates that the court imposed a $50 laboratory fee and $145 in penalty assessments. In view of this, we will direct the trial court to issue an amended minute order for Mendoza's September 18, 2014, sentencing in case No. BF153404A that omits any reference to this fee and these penalty assessments.

appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880.) The forfeiture rule generally applies to sentencing. (*Id.* at p. 881.)

Since Mendoza did not object in the trial court to the assertedly erroneous imposition of the penalty assessments, he is deemed to have forfeited his right to raise this claim on appeal.[3] But even if this issue were properly before us, we would reject it on the merits.

Section 11372.5 imposes a "criminal laboratory analysis fee" on defendants who are convicted of enumerated drug offenses, including a violation of section 11378. (§ 11372.5, subd. (a).) The sentencing court is to "increase the total fine necessary to include this increment." (*Ibid.*) A "fine" not in excess of $50 is imposed, which is deposited into a "criminalistics laboratories fund" for every conviction of certain enumerated drug offenses. (*Id.* at subds. (a) & (b).)

There is a conflict of authority regarding the criminal laboratory analysis fee under section 11372.5. In addition to *Watts*, in *People v. Vega* (2005) 130 Cal.App.4th 183 (*Vega*), the Court of Appeal, Second Appellate District, Division Seven concluded that because this fee did not qualify as "punishment" within the meaning of Penal Code section 182, subdivision (a), the fee was improperly imposed upon the defendants in that case who were convicted of conspiracy to transport cocaine. (*Vega,* at pp. 185, 194-195.)

In contrast, in *People v. Sharret* (2011) 191 Cal.App.4th 859 (*Sharret*), the Court of Appeal, Second Appellate District, Division Five concluded that this same fee constituted punishment. (*Id.* at p. 869.) We agree with *Sharret* that the fee under section 11372.5 constitutes punishment.

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**3** Mendoza contends he did not forfeit this issue because the $145 in assessments was an unauthorized sentenced that may be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) However, as explained below, the $145 in assessments was not an unauthorized sentence.

As *Sharret* analyzed and determined, the language of section 11372.5 provides that the laboratory analysis fee is punitive in nature because a sentencing court is to increase the total fine in increments as necessary for each separate offense. (*Sharret, supra,* 191 Cal.App.4th at pp. 869-870.) The fee may only be imposed upon a criminal conviction and it has no application in a civil context. (*Id.* at p. 870.) The fee is assessed in proportion to a defendant's culpability. The fee is mandatory and without an "ability to pay requirement." The fees are used for law enforcement purposes, and "earmarked for the criminalistics laboratories fund, which has no civil purpose." (*Ibid.*) There is no evidence section 11372.5 "was a mere budget measure" like other statutory fees. (*Sharret,* at p. 870.)

In *Vega, supra,* 130 Cal.App.4th 183, the appellate court acknowledged that "[a] cogent argument can be made from the language of [ ] section 11372.5, subdivision (a) [that] the Legislature intended the $50 laboratory 'fee' to be an additional punishment for conviction of one of the enumerated felonies." (*Vega, supra,* 130 Cal.App.4th at p. 194.) This is because the statute refers to the "fee" as a "fine" which may be imposed in increments reflecting the number of offenses committed in addition to any other "penalty" prescribed by law. (*Ibid.*; § 11372.5, subd. (a).)

*Vega* found support for this interpretation from *People v. Talibdeen* (2002) 27 Cal.4th 1151 (*Talibdeen*), in which our Supreme Court held the penalty assessments applicable to " 'every fine, penalty, or forfeiture' " applied to the laboratory analysis fee in section 11372.5. (*Id.* at pp. 1153-1154.) However, *Vega* found *Talibdeen* not controlling because the Supreme Court assumed (along with the parties in that case) that the laboratory analysis fee was a punishment and *Talibdeen* did not analyze that issue. (*Vega, supra,* 130 Cal.App.4th at p. 195.)

The *Vega* court found the labels "fee" or "fine" not a dispositive indicator of an intent to be punitive, particularly when the Legislature used both terms in the same statute. (*Vega, supra,* 130 Cal.App.4th at p. 195.) "Fines are imposed for retribution and

deterrence; fees are imposed to defray administrative costs." (*Ibid.*) *Vega* held "the main purpose of [ ] section 11372.5 is not to exact retribution against drug dealers or to deter drug dealing … but rather to offset the administrative cost of testing the purported drugs the defendant transported or possessed for sale in order to secure his conviction." (*Ibid.*) "The legislative description of the charge as a 'laboratory *analysis* fee' strongly supports our conclusion, as does the fact the charge is a flat amount, it does not slide up or down depending on the seriousness of the crime, and the proceeds from the fee must be deposited into a special 'criminalistics laboratories fund' maintained in each county by the county treasurer." (*Ibid.*)

Section 11372.5, subdivision (a) provides:

> "Every person who is convicted of a violation of [the offenses enumerated therein including section 11378] shall pay a *criminal laboratory analysis fee* in the amount of fifty dollars ($50) for each separate offense. The court shall increase the total fine necessary to include this increment.
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> "With respect to those offenses specified in this subdivision *for which a fine is not authorized by other provisions of law,* the court shall, upon conviction, *impose a fine in an amount not to exceed fifty dollars ($50),* which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law." (Italics added.)

The first paragraph of section 11372.5, subdivision (a) characterizes the $50 assessment it authorizes as a "fee." *Watts* found this characterization controlling. In doing so, the court interpreted the second paragraph of this subdivision as "establish[ing] that in the case of an offense 'for which a fine is not authorized by other provisions of law,' the crime-lab fee acts as a fine and is, in turn, subject to penalty assessments.' " (*Id*. at p. 235.) However, it also found that the most reasonable interpretation of the phrase "not authorized by other provisions of law" was that it referred to offenses for which no separate fine was permitted to be imposed. (*Ibid*.) The *Watts* court further found that the second paragraph of subdivision (a) did not apply to a conviction for

violating section 11378 because although that statute did not provide for a base fine, the offense was subject to a fine pursuant to Penal Code section 672.[4] (*Id*. at pp. 235-236.) Therefore, it found controlling the first paragraph's characterization of the crime-lab fee as a fee that was not subject to penalty assessments.[5] (*Id*. at p. 237.)

We find *Sharret* more persuasive than *Vega* and *Watts* and adopt its conclusion that the fee in section 11372.5 is punitive. Although this section refers to the imposition of a "fee," the section reflects the imposition of both a fine and a penalty, especially when considered with other statutes. (§§ 11372.5, subd. (a), 11502, subd. (a); Pen. Code, §§ 1205, 1464.8.) Other courts have found this fee mandatory and a fine. (See *People v. Taylor* (2004) 118 Cal.App.4th 454, 456 [this fee is mandatory]; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413 [this fee is mandatory and subject to mandatory penalty assessments]; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1522 [the laboratory fee is a fine]; *People v. Clark* (1992) 7 Cal.App.4th 1041, 1050 [this fee is mandatory].) Accordingly, we deem the fee under section 11372.5 to be a "punishment" such that the court properly imposed penalty assessments against Mendoza based on this fee. (*Sharret, supra,* 191 Cal.App.4th at p. 870.)

## DISPOSITION

The judgment is affirmed.

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[4] Penal Code section 672 provides: "Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars ($1,000) in cases of misdemeanors or ten thousand dollars ($10,000) in cases of felonies, in addition to the imprisonment prescribed."

[5] The court reached this conclusion even while recognizing that the second paragraph of section 11372.5 is surplusage because there are presently no offenses for which no separate fine is permitted to be imposed and, thus, the paragraph has no current application. (*Watts*, *supra*, 2 Cal.App.5th at p. 236.)